

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v Trainor Brown*, 2020 NSPC 28

Date: 20200629

Docket: 8275018

8275019

Registry: Amherst, NS

Between:

Her Majesty the Queen

v.

Tara Trainor Brown

DECISION ON TRIAL

Judge: The Honourable Judge Rosalind Michie

Decision: June 29, 2020

Charges: *Criminal Code 253(1)(a), Criminal Code 253(1)(b)*

Counsel: Mr. Paul Drysdale, for the Provincial Crown
Mr. James Giacomantonio, for the Defence

By the Court:

[1] Tara Trainor Brown is charged with:

On or about the 6th day of September A. D. 2018 at, or near Springhill, Nova Scotia, did while her ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to Section 253(1)(a) of the Criminal Code;

That Tara Lynn Trainor Brown on or about the 6th day of September in the year 2018 at the Town of Springhill in the said Region, having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded eighty milligrams of alcohol in one hundred milliliters of blood did operate a motor vehicle, to with a motor vehicle contrary to Section 253(1)(b) of the Criminal Code.

[2] Ms. Trainor Brown was involved in a single-car collision on the afternoon of September 6, 2018 near Springhill, Nova Scotia. At the police station, she provided two breath samples registering readings of 250 and 240 milligrams of alcohol in 100 millilitres of blood respectively. I understand that the Crown is not seeking a conviction on the first count.

[3] Trial commenced on this matter October 9, 2019. A *voir dire* was held, after which I ruled that there were sufficient objective and subjective grounds for Constable Dow to make the breath demand, and accordingly there was no breach

of Ms. Trainor Brown's section 8 *Charter* rights and the results of the analysis of her breath samples are admissible as evidence in the trial.

[4] The case against the accused is a strong one, and many of the elements of the offence are not contested. The ultimate issue in this case is whether there is a reasonable doubt that Ms. Trainor Brown consumed the majority of the alcohol shortly after she drove her Jeep into the ditch.

[5] I heard from three Crown witnesses – the officer on the scene, Constable Travise Dow, forensic toxicologist Josette Hackett and civilian witness Roger Smith. In support of the Crown's case, photographs of the scene were tendered, - a Google Maps aerial photo of the general area, the certificate of qualified technician, the expert report of Josette Hackett. Two further exhibits were tendered, which included a bag with two empty vodka cooler cans and one full bottle of vodka, the final exhibit containing an empty vodka bottle.

[6] By the end of the trial the following was clear: Ms. Trainor Brown was driving a rented Jeep at approximately 2:00 p.m. on September 6, 2018 on Highway 142 near Springhill, Nova Scotia. The vehicle left the road while the driver was navigating a right turn onto a small connector road. The vehicle

continued down a steep embankment into a boggy area, ultimately resting against the base of a large tree.

[7] Roger Smith was watching TV in his living room with his girlfriend in his house which is located nearby. He heard a noise outside, initially thinking it was people squealing their tires. Then he heard a second sound like something hitting the gravel. He testified that he jumped up and looked out the patio door and saw the roof of a vehicle in the ditch which had gone down over the bank. He noted a half-ton truck parked on the shoulder of the road containing two individuals whom he recognized but did not know by name. He told his girlfriend to call 911 and he ran across the lawn toward the ditch, at which point he saw that it was a Jeep that was in the ditch.

[8] He arrived at the scene quickly, within five minutes. He spoke to the two individuals in the truck and he determined that there was a lady still in the Jeep. He proceeded down the embankment toward the Jeep to see if she was all right. He checked to see if she was hurt, and she indicated that she was fine. When he arrived at the location of the Jeep, the driver was trying to get the Jeep out of the ditch by shifting between forward and reverse. He had seen a similar accident approximately six months before and knew that there was no way she would be

able to get the Jeep out of the ditch. He advised her of that fact and suggested that she leave the keys in the vehicle and turn it off, which she did.

[9] Mr. Smith noted that the driver looked disoriented, which he thought was understandable after driving over the embankment. He also thought he smelled a slight smell of alcohol, but that it was hard to distinguish because it was in a swampy area. He was standing about one foot away from the Jeep.

[10] At that point Mr. Smith's girlfriend advised him from the roadside that she had called 911 and that they wished to speak with him. He climbed up the embankment and spoke with them for a short time, at which point a police officer arrived on the scene. While he was speaking with the 911 operator, he testified that he was keeping an eye on the vehicle to ensure that nothing happened while he was on the phone with 911. He testified that he did not have a clear or unobstructed view of the inside of the vehicle from his vantage point, and would not have been able to see the driver consuming alcohol even if she was. He was away from the Jeep speaking with 911 for a period of two to three minutes before the police arrived.

[11] RCMP Constable Travise Dow arrived at the scene. The dispatch call came to him at 2:09 p.m. and he arrived on scene at 2:15 p.m. When he arrived at the

scene, he observed Mr. Smith standing roadside. He parked his police cruiser and spoke with him briefly and was advised that the driver was still in the vehicle. He gathered some quick details and then he descended the embankment to the vehicle in the ditch. His evidence was that he was on the scene perhaps a minute before going down to the ditch.

[12] His primary concern at this point was the safety of the driver and whether or not she had sustained injuries. He told the driver to remain in her vehicle until 911 arrived, to which she agreed. Constable Dow made his way to the driver's side door. He noted the position of the Jeep to be elevated, and when the door was opened, he observed a bottle of alcoholic beverage on the floor the Jeep. The photos contained in Exhibit 2 were taken by Constable Campbell and they depicted the 375-millilitre bottle of Iceberg vodka that Constable Dow saw under the driver's seat on the left of the Jeep seat. The bottle was mostly empty, and he noted that the screw top was loose. He noted other beverage cans on the floor of the Jeep in the driver's side, but he did not take note at the time whether or not they contained alcohol. The exhibits found under the driver's side of the Jeep were seized and included two empty cans of Firefly vodka coolers, a full 375-millilitre bottle of Iceberg vodka and an empty 375-millilitre bottle of Iceberg vodka.

[13] When Constable Dow confronted the driver with the presence of the alcohol in the vehicle, she replied that she was not drinking and that the bottle must have been there from a previous rental and that they were not hers.

[14] Constable Dow noted a slight odour of alcohol at the vehicle. He advised her of this, and she replied again that she had not been consuming alcohol. Constable Dow then read the approved screening device demand to Ms. Trainor Brown at 2:18 p.m., at which point she again denied drinking.

[15] Constable Dow accompanied Ms. Trainor Brown through the swampy ditch and up the embankment to the police car. He noted Ms. Trainor Brown to be wearing business attire with flat business shoes with little or no tread. She had some difficulty making her way up the steep, rocky terrain. Constable Dow noted that when she reached the top of the embankment, at one point she leaned against the police car for balance and he also noted her cheeks to be very flushed. Ms. Trainor Brown entered the back of the police car of her own accord and Constable Dow believed that she may have been embarrassed because of nearby onlookers.

[16] Once Ms. Trainor Brown entered the police car, Constable Dow noted an overwhelming odour of alcohol which was emanating both from her breath and seemingly from her pores as well. At that point Constable Dow changed his mind

and did not give Ms. Trainor Brown the approved screening device demand as he felt that he had reasonable and probable grounds to arrest the accused for impaired driving. He placed her under arrest for impaired driving and read her rights from his preformatted *Charter* card. There was no objection to the form of arrest and the *Charter* warning that was read to Ms. Trainor Brown.

[17] When Ms. Trainor Brown was placed under arrest, she responded again that she had not been drinking and that she would be refusing to provide samples of her breath. Constable Dow advised her that that was her choice, but that her refusal would lead to the same result, with the same consequences should she refuse. He also advised her that she would not be able to refuse the breath demand at roadside. She would have to be in front of the breath technician at the RCMP detachment to do that. Ms. Trainor Brown confirmed that she understood her rights to counsel and did not wish to speak to a lawyer.

[18] Constable Dow left the scene at 2:37 p.m., arriving at the detachment at Springhill at 2:44 p.m. Upon arrival, Constable Dow reminded Ms. Trainor Brown of her right to counsel, which she declined. Constable Dow is a qualified breath technician so he started the observation period which precedes the taking of breath samples. Ultimately Constable Ryan Wilson arrived and it was determined that he

would be acting as the qualified breath technician in the investigation, so he commenced his own observation period while Constable Dow left to do paperwork.

[19] When Constable Dow was with Ms. Trainor Brown during the initial observation period, he asked her when she had consumed her last drink, to which she responded two hours prior. This question was asked at 2:46 p.m. She also indicated that she had a breakfast that day. Constable Dow estimated Ms. Trainor Brown's weight to be in the range of 125 to 140 pounds.

[20] The certificate of the breath test analysis was tendered in court as Exhibit 3. Ms. Trainor Brown provided two samples of her breath to qualified technician Constable Wilson at 4:53 and 5:13 p.m. and the results of those breath samples were 250 and 240 millilitres of alcohol per 100 millilitres of blood respectively. It was noted that the slight delay in obtaining the breath sample results were due to the fact that two readings of mouth alcohol were registered at 4:12 and 4:33 p.m. On cross examination Constable Dow testified that based on her roadside presentation at 2:46 p.m. he was not surprised that her readings were so high.

[21] Josette Hackett, an RCMP toxicologist, testified by video at the trial. She provided a read-back of the BAC results to determine Ms. Trainor Brown's blood

alcohol concentration at the time of the accident. Based on the information she received from Constable Dow, she was able to determine Ms. Trainor Brown's blood alcohol concentration at the time of the incident at 1408 hours as being between 271 and 302 milligrams of alcohol in 100 millilitres of blood. That calculation assumed that no alcohol was consumed in the 30 minutes prior to the time of the accident and that no alcohol was consumed between the time of the accident and the time that the samples were collected. Ms. Hackett's toxicological report contained the caveat that if alcohol was consumed during either of those times, the calculated blood alcohol concentration would be too high by an amount proportional to the amount of alcohol consumed. This was confirmed in her *viva voce* testimony as well.

[22] For the purposes of Ms. Hackett's calculations, she used a median weight of 132.5 pounds. At paragraph two of her report she noted that for a 132.5 pound female to have a blood alcohol concentration of 80 milligrams at the time of the accident, 1408 hours, and subsequently produce a measured blood alcohol concentration of 240 milligrams percent at 1713 hours, the individual would require to have in her stomach, unabsorbed, certain minimum amounts of alcohol at the time of the incident or consumed after the time of the incident and before the

samples were collected, which she calculated to be 7.2 to 8.4 ounces of hard liquor containing 40% alcohol per volume.

[23] Ms. Hackett testified that there are certain factors, such as the rate of consumption and the amount of food consumed, that could not be accounted for in the calculations. The report further explained at paragraph two that this calculation was in fact a theoretical minimum and that in a real drinking situation, the actual amount required to increase the blood alcohol concentration could be up to twice the calculated amount. Ms. Hackett also confirmed in her testimony that if the individual was ten pounds heavier or lighter than the 132.5 pounds assumed, there will be no significant change in the calculated amount.

[24] At paragraph five of Ms. Hackett's report she provided a list of the expected symptoms of an average social drinker at various blood alcohol concentrations. A BAC in the range of 150 to 300 milligrams percent is generally associated with moderate to severe intoxication, and as the BAC increases, the symptoms of intoxication become more intense, creating marked problems with gross motor control and coordination, leading to balance problems, staggering gait and notable slurred speech. The performance of physical tasks is likely to be adversely affected due to a loss of both fine and gross motor control and coordination. A heavily

intoxicated person may display significant mental and sensory impairment, exaggerated emotional states, rapid changes in emotional state, impaired memory and mental confusion. She also detailed in her report that a BAC which exceeds 300 milligrams is generally associated with severe intoxication characterized by significant mental and motor dysfunction which could result in inertia, apathy, incontinence, stupor, loss of consciousness, coma and possible death due to respiratory depression. It was also noted that the symptoms displayed can be affected by the tolerance of the individual, and that if an individual is accustomed to the effects of alcohol due to repeated exposure to high blood alcohol concentrations, they may require higher blood alcohol concentration to display the above symptoms.

[25] During cross-examination, defence counsel asked questions about the assumptions underlying Ms. Hackett's opinion, and proposed two hypothetical scenarios to her, requesting that she calculate a blood alcohol concentration based on the scenarios.

[26] Ms. Hackett confirmed that the weight of the individual only comes into play when calculating how much alcohol an individual would have to consume after the time of the accident to have a blood alcohol concentration of 80

milligrams percent at the time of the accident, and that weight does not factor into her calculation when determining a BAC at the time of the accident based on the readings obtained later by the breath technician.

[27] The weight of the subject, however, would have an impact on the calculation of the number of drinks that would need to be consumed for the subject to have a BAC of 80 milligrams percent at the time of the collision, if the alcohol was consumed shortly before or after the collision. Ms. Hackett was asked by defence to adjust her opinion with all factors being equal but changing the weight of the subject to 125 pounds. Ms. Hackett testified that the adjusted blood alcohol concentration for a 125 pound woman to have a blood-alcohol concentration of 80 milligrams at 1408 hours, but have a blood alcohol concentration of 240 milligrams percent at the time the sample was taken, she would have to have absorbed 6.8 to 7.9 ounces of hard liquor at 40% alcohol by volume.

[28] Defence then presented two hypothetical situations upon which he requested Ms. Hackett perform a live extrapolation based on a slightly different set of assumptions. He first confirmed that a 375-millilitre bottle of liquid would equate to 13.1 ounces.

[29] To further understand the opinion of the toxicologist, defence counsel asked if a 125-pound female were to consume 6.8 ounces of vodka at 40% alcohol per volume either 30 minutes prior to the time of driving or any time after, her blood alcohol concentration at 1713 hours would be 240 milligrams of alcohol in 100 millilitres of blood, but would be 80 milligrams percent at the time of driving, and that if any more than 6.8 ounces was consumed 30 minutes prior or anytime after driving, that would place the subject under 80 milligrams percent at the time of driving. This was confirmed by Ms. Hackett.

Hypothetical 1 – Consumption of two-thirds bottle of 375-millilitre bottle of vodka at 40% APV

[30] Ms. Hackett confirmed that two-thirds of a 375-millilitres bottle of vodka would contain approximately 8.7 ounces of liquid.

[31] Ms. Hackett was asked to calculate a BAC for a 125-pound female, assuming she consumed two-thirds of a bottle of vodka at 40% alcohol per volume (APV), or 8.7 ounces prior to or just after the time of driving at 2:08 p.m.

[32] Ms. Hackett concluded that 8.7 ounces of hard liquor would be expected to contribute at most 244 milligrams percent to the BAC of a 125 pound female, and when that is subtracted from the BAC between 271 and 203 milligrams/percent

that she calculated at paragraph one of her report, the adjusted BAC would be 27 to 58 milligrams/percent at 2:08 p.m., the time of driving, both readings falling under the 80 milligrams per 100 millilitre blood.

HYPOTHETICAL 2 – Consumption of three-quarters bottle of vodka at 40% APV

[33] The second hypothetical put to Ms. Hackett asked her to assume the 125-pound female consumed three-quarters of a bottle of vodka at 40 % APV, or 9.8 ounces, prior to or just after the time of driving at 1408 hours.

[34] Ms. Hackett concluded that the consumption of 9.8 ounces of vodka would be expected to contribute no more than 274 milligrams/percent to the BAC at the time of driving. When this amount is subtracted from the BAC between 271 and 203 milligrams/percent that she calculated at paragraph one of her report, the adjusted BAC would be 0 to 28 milligrams/percent at 2:08 p.m., the time of driving, both readings falling under 80 milligrams per 100 millilitres of blood.

[35] I accept the evidence of the prosecution witnesses. Constable Dow gave clear evidence with good attention to times and details. Similarly, I accept the evidence of the civilian witness and his observations that he made of the accused in the brief period that he had contact with her. Neither were challenged or

significantly impeached on cross-examination. Similarly, Ms. Hackett is an experienced toxicologist who testified in a clear, concise and even-handed way. She was able to apply her expertise in making in-court calculations in response to defence hypotheticals and I accept her evidence without reservation.

[36] The accused, Ms. Trainor Brown testified. She is a 45-year-old female who weighed 125 pounds on Sept 8, 2018. Ms. Trainor Brown testified that she works as a sales representative in the tobacco industry and was so employed at the time of the alleged offence. Her duties included visiting convenience stores located within her territory to ensure the proper freshness and presentation of the products.

[37] Ms. Trainor Brown lives in Stratford, Prince Edward Island, and her territory covers all of PEI, Amherst, Springhill and extending into the Oxford area in Cumberland County, Nova Scotia.

[38] On September 6, 2018 Ms. Trainor Brown was working, covering her sales territory and visiting stores in the various communities.

[39] She testified that she dropped her kids off for their first day back to school at about 8:15 a.m., preceded to Borden, approximately a one-hour drive from her home, and then stopped at the liquor store. She bought two cans of Blackfly vodka coolers and a 375-millilitre bottle of Iceberg vodka. Ms. Trainor Brown testified

that she also had in her possession another 375-millilitre bottle of Iceberg vodka from which she had taken one or two drinks the night before.

[40] Ms. Trainor Brown testified that she was a late stage alcoholic, and that she would carry two pints of liquor with her at all times. She purchased pints because they are easier to conceal than the larger “quart” bottles. She explained this is why she was purchasing liquor at 9:00 a.m. Ms. Trainor Brown estimated that approximately 90% of the pint bottle of vodka still remained on the morning of September 6, 2018. Ms. Trainor Brown estimated that she drank between a pint and a quart of hard liquor per day at the time.

[41] Ms. Trainor Brown testified that she did not drink any alcohol before dropping her children off to school, and did not consume her first drink until after she crossed the Confederation Bridge into New Brunswick because it was too risky due to numerous cameras located on the bridge. She testified she took her first drink between 9:30 and 9:45 a.m., and that she drank a Blackfly vodka cooler. Ms. Trainor Brown testified that she had stopped in Borden because, to her knowledge, Black Fly vodka coolers are not available in cans in Nova Scotia.

[42] Ms. Trainor Brown then visited three or four stores in the Amherst area, then proceeded to visit a couple of stores in Springhill. She testified that she arrived in

Amherst at approximately 10:30 a.m., and arrived in Springhill at around 12:30 p.m., and called on two to three stores. She then proceeded toward Oxford, at which point she was involved in the motor vehicle collision.

[43] Ms. Trainor Brown testified that she consumed a bagel with cream cheese at 7:00 a.m. and had nothing further to eat that day. She opened her first cooler before 10:00 a.m., and in the proceeding four hours she drank the two full Blackfly vodka cooler cans, and she also drank two mouthfuls from the open pint bottle of vodka.

[44] Her evidence was that prior to the accident, after taking a couple more swigs from the bottle, the level of the vodka bottle immediately prior to the accident would have been two-thirds to three-quarters full.

[45] When Ms. Trainor Brown was asked to provide a more detailed account of the timing and quantity of her drinking in the four hours prior to the accident, she testified that she had finished the two vodka coolers and remembered that when she arrived in Springhill she took a couple of drinks from the vodka bottle. She testified that she was in Springhill for approximately one hour, so she estimated that she took the two drinks at approximately 1:00 p.m., and this was the last time that she consumed any alcohol prior to the accident.

[46] With respect to the accident, Ms. Trainor Brown testified that she was leaving the Springhill area and heading toward Oxford, driving her rental vehicle and using a GPS for directions. She testified that she had been off work for approximately a year and a half because she had been struggling with addiction issues. Her original territory was only within the province of Prince Edward Island, and this region was newly added to her sales area.

[47] Ms. Trainor Brown testified that normally when she does her sales checks at the convenience stores, she first drives to Oxford, the furthest point away from her home, and works her way back. On the date in question she conducted her business in the opposite direction, starting at the closest location and working her way out toward Oxford. She was relying on her GPS to make her way back.

[48] At the time of the accident, Ms. Trainor Brown testified that she was engaged in a gradual return to work at the time, and she was not completely familiar with the roads.

[49] She testified that she left Springhill, driving on Highway 142 heading toward Highway 104. She looked at her GPS, and initially thought that she had “overshot” the right turn that would take her onto the highway, so she tried to make a quick turn, but at that point she was essentially past the road. She tried to

execute a quick, sharp turn because she thought that she was missing the exit, which was actually located further ahead of where she was turning. Essentially, she mistook the Saltsprings connector road as the exit to the Trans-Canada Highway. As a result, she lost control of the vehicle and went into the ditch. She tried to drive her vehicle out of the ditch, as Mr. Smith had indicated, by revving the vehicle in drive and then in reverse. This did not work. She testified that she did not realize how far down she was in the ditch. She shut off her vehicle as Mr. Smith suggested, and she confirmed with him that she was okay.

[50] She testified that Mr. Smith then left her and climbed up the hill to speak on the phone. At that point she took out the open pint of vodka, looked around and drank half of the remaining contents of the bottle. She paused, looked around again to see if anyone was observing her and drank the most of what remained in the pint bottle and then replaced it on the floor on the left side of her seat.

[51] According to Ms. Trainor Brown, she consumed the vodka out of panic. She testified that she had been advised that the police were en route, and due to her panic she consumed two-thirds to three-quarters of the pint of vodka with the intention to get rid of the evidence so that the police would not see that she had open liquor in the vehicle. Her thought process was that with her high tolerance

levels to alcohol, when the police arrived she could still appear sober, and it was her intention to refuse the breathalyzer. She was only told later by Constable Dow that refusing the breathalyzer garners the same result as having a blood alcohol level exceeding 80 milligrams percent, but she was not aware of that fact at the time.

[52] Ms. Trainor Brown went on to explain that her initial drink was taken strictly as a result of panic and to get rid of the liquor, but that the second drink which essentially finished off the pint of vodka was desperation. She testified that she had been seeking help for her alcohol addiction for years, and now she figured that “the gig was up”. She testified that she had been trying to obtain addiction services off of the Island for some time with no success, but that after this incident she sought help.

[53] Ms. Trainor Brown testified that her intention in consuming such a large amount of vodka was not to defeat the BAC readings or frustrate the police investigation but was purely panic reaction.

[54] Ms. Trainor Brown acknowledged that she was not truthful with Constable Dow when she told him that she did not have anything to drink. When asked why she did not tell the truth, she responded that she didn’t want to get caught and lose

her driver's license and her job. She thought that because of her high tolerance to alcohol she could "pull it off" and appear sober when she really wasn't.

[55] Similarly, when she denied that she was drinking at the police car when the breathalyzer demand was made, she also was untruthful because she didn't want to get caught.

[56] 20 minutes later, at the Springhill RCMP detachment during the observation period, she told police that she had consumed her last drink two hours prior to the accident. She testified that this was not truthful, and that she drank the stated amount after the collision. Ms. Trainor Brown's evidence was that she lied to police again at this point because she wanted help. In her mind, if she told the officer that she drank the vodka after the accident, the chances were that they would not charge her.

[57] On cross-examination, Ms. Trainor Brown confirmed that after being off for one and one half years, Cumberland County was essentially a new sales territory for her. Even though it had been added approximately three months before she went off work, she had travelled in the Cumberland County sales area on only three prior occasions before she went off work.

[58] Ms. Trainor Brown confirmed that the date of the incident was her first trip back to her Nova Scotia sales territory, and that she had been returning to work on a gradual basis since mid-July, but for most of that time she had been travelling with other sales representatives in their respective territories throughout Nova Scotia, after which point she was assigned to return to work in her home territory. Ms. Trainor Brown had some familiarity with the area, travelling it from the opposite direction on three prior occasions, but she relied on the GPS to assist her. She also testified that she has a very limited sense of direction, and with only three trips from the opposite direction under her belt she did not feel terribly familiar with the area.

[59] Ms. Trainor Brown acknowledged that she normally drinks directly from the bottle and does not mix her drinks, taking mouthfuls and not sips. She could not specifically recall the amount that she had consumed the night before, just a couple of drinks from the bottle.

[60] She agreed with the Crown suggestion that it was an exercise in futility or wishful thinking that she would be able to get the Jeep out of the ditch, but she attempted it nonetheless.

[61] The Crown suggested that rather than drinking the vodka, attempting to appear sober and then refusing the breathalyzer, would it not have been easier to simply not drink the three-quarters bottle of vodka, to which Ms. Trainor Brown replied that she panicked, and that she was trying to get rid of the evidence, which was the open bottle of vodka. She testified that at the time, she figured that if police found the empty bottle and she refused the breathalyzer that she would not be charged.

[62] Ms. Trainor Brown testified that she had never been in trouble with the police before. She testified she felt certain that she was not impaired at the time of the collision, but she was very concerned about being caught with open liquor in the car. She also testified that she was concerned that the police were going to demand a sample of her breath, but that she intended to refuse the breath demand after drinking the liquor.

[63] Ms. Trainor Brown acknowledged that she also lied to Constable Dow when she denied drinking and that the purpose of this lie was to conceal her alcohol consumption. She acknowledged lying to police a second time in the police car when she again denied drinking, and then also lying to police a third time during the observation period. She was very concerned that she was going to get caught

and lose her job. She also testified that she needed and wanted help. Ms. Trainor Brown testified that she believed that if she told the police officer that she drank the liquor in her vehicle, she wouldn't have received the help that she needed because she would not have been charged. Her evidence was that at that point she lied to ensure that the police would charge her, and she could get help. She clarified that at the time she was a very sick individual, and that her thought process at the time really didn't make much sense, and that she didn't even call a lawyer that day. Ms. Trainor Brown testified that she then provided the samples of her breath.

[64] With respect to Ms. Trainor Brown's evidence, I can accept some, all or none of it. In this case, I do not accept all of Ms. Trainor Brown's evidence. It is clear, by her own admission, that she lied on several occasions about her consumption of alcohol. She explained her reasons for not telling the officer the truth at the time of the investigation, and her explanations lacked internal consistency at times. For example, at one point she denied consuming alcohol to Constable Dow, and explained that she drank the remainder of the vodka in the bottle so that the police would not find open liquor in her vehicle, and she believed that she could "pull it off" and appear sober, due to the fact that she is an alcoholic and has a high tolerance for alcohol. Clearly, she was trying to avoid being

charged. She continued to deny consumption in the police car. However, once at the detachment she told the officer that she drank two hours prior, because she was making a “cry for help” and wanted to be charged. These inconsistencies are not insignificant, given that they are highly relevant to the “bolus drinking” issue, but I also accept her explanation that at the time she was very sick, and her thought process wasn’t the best at the time.

[65] I am however prepared to accept most of Ms. Trainor Brown’s evidence. Her evidence was given in a straightforward, unembellished manner. She admitted to things that cast her in a negative light, she admitted that she was a severe alcoholic and that she was drinking throughout the day in question while driving. She did not try to diminish her actions and she exhibited very good recall of the events that were not impeached on cross-examination, with the exception of her comments to Constable Dow about her drinking patterns.

THE LAW

[66] As always, the burden rests upon the prosecution to satisfy the court that the allegation and all necessary elements of the offence have been proven beyond a reasonable doubt. If the prosecution fails in any respect, the presumption of innocence is not displaced, and the defendant is to be acquitted.

[67] This case raises the issue of credibility. In saying that, I recognize that I cannot decide this case as if it were simply a contest of competing versions of events where I make a decision to prefer one version over the other. That is an impermissible line of reasoning by the trier of fact because it ignores the presumption of innocence and the underlying burden upon the prosecution to prove the offences charged beyond a reasonable doubt. Even if I totally reject the defendant's evidence, I must still acquit her unless I'm not left with a reasonable doubt about her guilt based on the evidence that I do accept.

[68] In assessing the credibility of the witnesses in this case, I must apply the principles articulated by the Supreme Court of Canada in *R. v. W.(D)*. [1991] 1 SCR 742:

1. I cannot properly resolve this case by deciding which conflicting version of events is preferred;
2. If I believe the evidence that is inconsistent with the guilt of the defendant, I cannot convict the accused;

3. Even if I do not entirely believe the evidence inconsistent with the guilt of the defendant, if I cannot decide whether that evidence is true, then there is a reasonable doubt and the defendant must be acquitted;

4. Even if I entirely disbelieve evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and

5. Even where I entirely disbelieve evidence inconsistent with guilt, the defendant should not be convicted unless the evidence that is given credit proves the defendant's guilt beyond a reasonable doubt.

[69] Reasonable doubt lies much closer to proof to an absolute certainty than it does to proof on a balance of probabilities, *R. v. Starr* [2000] 2 SCC 40, at para. 42.

[70] Section 258(1)(c) of the *Criminal Code* creates a presumption commonly called the presumption of identity, which is essentially a shortcut to establishing the driver's blood alcohol concentration (BAC) at the time of the offence. In this case, where the samples were not taken within two hours of the commission of the offence, the presumption of identity cannot be relied upon, in which case the Crown must prove the accused's blood alcohol level at the time of the offence. To

do this, the Crown called an expert toxicologist, Ms. Josette Hackett, to adduce evidence of the BAC of Ms. Trainor Brown at the time of the accident.

[71] There is no question that Ms. Trainor Brown was impaired and had a dangerously high BAC by the time she was tested at the police station. The central issue in this case is whether I have reasonable doubt that Ms. Trainor Brown consumed a quantity of vodka in the minutes immediately after her vehicle ended up immobilized in the ditch and before taking the test. More specifically, has the Crown disproved that beyond a reasonable doubt? The law is clear; if there is an air of reality to this issue, the Crown must disprove it beyond a reasonable doubt.

[72] The case law makes it clear that an accused does not have to testify, although she did in the case at bar. The Court can resort to a common sense inference that most people do not consume large amounts of alcohol just prior to driving. However, if an accused can point to something in the evidence that raises the issue as a live, real issue, the Crown must disprove that possibility beyond a reasonable doubt, see *R. v. Grosse*, (1996), 29 O.R. (3d) 785 (Ont. C.A.) at para 792.

[73] These principles were articulated In *R. v. Paszczenko*, 2010 ONCA 615 (Ont. C.A.), and are applicable to the case at bar. The Court of Appeal held at paragraph 21:

There can be no dispute that the onus is on the Crown to prove the facts underlying the expert's report, including the assumptions upon which the expert relies. As Sopinka J. noted in R. v. Lavalee, [1990] 1 S.C.R. 852, at p. 898: "before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist." See also R. v. Grosse (1996), 29 O.R. (3d) 785 at p.790 (C.A.), leave to appeal refused, [1996] S.C.C.A. No. 465. As noted above, however, the issue here is not whether the Crown must prove the assumptions, but how it is required to do so.

[74] Essentially, the Crown must prove four underlying or common assumptions upon which toxicologists base their expert reports where the breath test has not been administered within two hours of driving. This was set out in paragraph 2 of *Paszczenko, supra*:

In the jargon of these cases, the four assumptions are commonly referred to as (i) no "bolus drinking", i.e. no rapid consumption of large amounts of alcohol shortly prior to the incident; (ii) no consumption of alcohol between the incident and the breath test; (iii) an "elimination rate" of 10 to 20 milligrams of alcohol in 100 millilitres of blood per hour; and (iv) a two-hour "plateau" after drinking where the rate of elimination does not change.

[75] If the Crown cannot establish an evidentiary basis for those underlying assumptions, then the Court cannot accept the opinion of Ms. Hackett and the

accused is entitled to an acquittal. The issue in this case is whether the Crown has proved the first two assumptions, that there was no bolus drinking and that the accused consumed no alcohol immediately after the accident.

[76] In the case at bar, the issue of bolus drinking and/or drinking post driving is a live issue. The Crown submits that it is not reasonable to infer that Ms. Trainor Brown drank 8.7 to 9.8 ounces or more at the relevant time. Respectfully, I disagree. I do note that, in light of the Crown's submissions on this point, it may be unlikely that Ms. Trainor Brown drank that amount, but I am not satisfied beyond a reasonable doubt in light of the following factors:

1. The officer on the scene noted signs of impairment including an odour of alcohol. In fact, he noted sufficient impairment to change his mind from suspecting that she had consumed alcohol to formulating reasonable and probable grounds that she was impaired by alcohol by the time she had climbed the embankment and entered the back of the police car. The increased signs of intoxication could be evidence of bolus drinking.
2. Constable Dow testified in his evidence that he was not surprised at her high breath readings based on the level of impairment that he observed at the time.

3. An essentially empty bottle of vodka was located on the left side floor area of the driver's seat, in addition to a full, unopened bottle of vodka and two empty cooler cans all located under the driver's seat area.
4. Ms. Trainor Brown did not want the police to find the opened bottle of vodka in her vehicle.
5. It is a realistic possibility that she drank some vodka in the time period immediately following the accident. There was an open, mostly empty bottle on the floor – she had both the time, the access and the opportunity to consume it.
6. The quantity of alcohol located in her car – two pints of vodka, one empty, one full and two empty cans of vodka coolers is a potential indication of abnormal drinking.

[77] The accident itself does not eliminate any doubt on this issue. It could be evidence of impairment at the time of driving. Ms. Trainor Brown testified that she overshot the turn trying to follow the direction on her GPS and mistook the road for the highway exit. She was not overly comfortable or familiar with the route she was taking. This could be an innocent reason for the accident. It might also be further evidence of impairment. Given my uncertainty and lack of

evidence concerning the cause of the accident, the accident itself and in conjunction with the rest of the evidence does not eliminate my doubt regarding the issue in this case.

[78] The issue of bolus drinking or drinking after the accident is a live possibility in this case. The amount of vodka missing from the pint bottle may be material. All things considered, there is a realistic possibility that Ms. Trainor Brown drank a significant amount of alcohol after the accident. The open, mostly empty bottle of vodka found below the driver's seat raises that issue. I do not know how much she drank, or that she drank less than 8.7 to 9.8 ounces. While I think she likely did not drink that much, I am not convinced beyond a reasonable doubt that she did not. Accordingly, while very suspicious, I am not satisfied beyond a reasonable doubt that bolus drinking did not occur, and although I do not accept all of the evidence of Mr. Trainor Brown, when I consider it in the context of the totality of the circumstances, I am left in a state of reasonable doubt, and I therefore find her not guilty.

R. Michie, JPC.